## INDEX

Page

Opinions below ..... 1
Jurisdiction ..... 1
Questions presented ..... 2
Statement ..... 2
Argument ..... 5
Conclusion ..... 10

## CITATIONS

Cases:

*Adickes* v. *Kress & Co.*, 398 U.S. 144 ..... 6
*Alderman* v. *United States*, 394 U.S. 165 ..... 5
*Brady* v. *Maryland*, 373 U.S. 83 ..... 2,9
*Brown* v. *United States*, 411 U.S. 223 ..... 5
*Cardwell* v. *Lewis*, No. 72-1603, decided June 17, 1974 ..... 6
*Chambers* v. *Maroney*, 399 U.S. 42 ..... 6
*Chapman* v. *California*, 386 U.S. 18 ..... 6
*Chimel* v. *California*, 395 U.S. 752 ..... 6
*Harrington* v. *California*, 395 U.S. 250 ..... 6
*Henderson* v. *United States*, 218 F. 2d 14 ..... 9
*Jones* v. *United States*, 362 U.S. 257 ..... 5
*Lawn* v. *United States*, 355 U.S. 339 ..... 6
*Simmons* v. *United States*, 390 U.S. 377 ..... 5
*Tuckerman* v. *United States*, 291 Fed. 958, certiorari denied, 263 U.S. 716 ..... 8

Cases (Continued): Page

*United States* v. *Holt*, 108 F. 2d 365, certiorari denied, 309 U.S. 672, rehearing denied, 309 U.S. 698 ..... 8-9

*United States* v. *Jordon*, 399 F. 2d 610 ..... 7

*United States* v. *Robinson*, 414 U.S. 218 ..... 6

Statutes and regulations:

18 U.S.C. 2 ..... 2

18 U.S.C. 371 ..... 2

18 U.S.C. 1341 ..... 2

18 U.S.C. 1343 ..... 2

18 U.S.C. 4208(a)(1) ..... 2

# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 73-1704

QUIMET J. PETERSEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 81-103) and its *per curiam* opinion denying rehearing (Pet. App. 104-105) are reported at 490 F. 2d 666.

### JURISDICTION

The judgment of the court of appeals was entered on December 5, 1973. A petition for rehearing and rehearing *en banc* was denied on March 15, 1974. On April 11, 1974, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to May 14, 1974, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioner had standing to challenge the seizure and search of his co-defendant's brief case found in the co-defendant's automobile at the time of the co-defendant's arrest.

2. Whether the government withheld exculpatory evidence in violation of the rule in *Brady* v. *Maryland*, 373 U.S. 83.

3. Whether the prosecuting attorney's questions or argument were improper and prejudicial.

4. Whether various instructions and rulings by the court were erroneous.

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner and his co-defendant, Robert Lee Frick, were found guilty on all five counts of an indictment charging use of the United States mails and interstate telephone and wire facilities to defraud, and with conspiracy to defraud, in violation of 18 U.S.C. 1341, 1343, 371, and 2. Petitioner was sentenced to concurrent sentences of three years' imprisonment subject to eligibility for parole after six months, pursuant to the provisions of 18 U.S.C. 4208(a)(1), on each count. The court of appeals affirmed, one judge concurring in part and dissenting in part (Pet. App. 81-103).

The facts show that petitioner and Frick were engaged in a scheme to defraud business people in need of capital by falsely promising to obtain loan financing for them in exchange for a fee. The clients would never receive the loans for which they had applied, nor would the fees be returned to them.

The testimony of Frank Crawly, III, the complaining witness, demonstrates how the scheme operated. Crawly owned the Bison Lumber and Supply Company in Shawnee, Oklahoma. In April, 1971, he attempted to obtain a loan to consolidate several outstanding loans and to buy out his partner (Tr. 31-32). A friend referred Crawly to Frick, who told him that he represented the Mortgage Corporation of America. Crawly told Frick that he wanted a loan of $400,000, which Frick said he would consider. Crawly then gave Frick a copy of his financial statement and pictures of his lumber yard (Tr. 37-39). Frick called Crawly a few weeks later and told him that the loan committee had approved a loan for $375,000 and that if Crawly was serious Frick would bring him a loan application shortly (Tr. 45-47). Crawly executed the loan papers and gave Frick a check for $3,750, which, supposedly, was a 1% earnest money fee (Tr. 56-57).

Frick subsequently advised Crawly that his application had been approved, and Crawly proceeded to comply with all of the directions given him by Frick (Tr. 63-66). Petitioner, Crawly and Frick met in New Orleans. Petitioner was introduced to Crawly as an associate with Mortgage Corporation of America. Frick gave Crawly a letter of commitment supposedly from the Tangible Risk Insurance Co., Ltd. (Tr. 71-73), in exchange for which Crawly gave Frick a check for $4,600 and cash in the amount of $937.50 (Tr. 75). This money, Crawly was led to believe, was in part for the loan application fee and in part for Frick (Tr. 76). Crawly testified that while in New Orleans he discussed arrangements for the loan with petitioner (Tr. 80-81).

Later, Crawly wired $1,000 to petitioner to perform an appraisal of his property (Tr. 97-101). Both petitioner and Frick later told Crawly that the loan was ready to

be closed, but on the appointed day only Crawly appeared. Crawly was subsequently told that Tangible Risk's loan officer was tied up on the agreed day but that the closing could take place a day later. After this second meeting was also cancelled, the closing was set for the following week. Crawly then called petitioner, who told him not to worry, that the closing would occur shortly. The loan was never closed, Crawly was never given a reason for failure to close the loan and was never told that he failed to comply with any of the loan requirements. The $10,000 already paid to petitioner and Frick was never returned, although Crawly made demands on both (Tr. 111-114).

The government also offered the testimony of Mrs. Janet M. Troxler, co-owner of the Jet Typing Service, Inc., who testified that petitioner had engaged her company to type a letter to Crawly on a Tangible Risk Insurance Co., Ltd. letterhead, which petitioner had provided her (Tr. 262-267).

Additionally, several witnesses testified that they knew petitioner and Frick under different names and that they had been victims of essentially the same scheme. Each witness testified that he had been promised financing, that he completed the necessary applications and paid the required fees, that he never received his loan and that the money paid to petitioner and Frick was never repaid (Tr. 279-289, 291-301, 306-307, 314-325, 344-349).

The briefcase, the seizure of which petitioner contests, contained files and documents belonging to Frick. Among the items seized from the briefcase were a Bison Lumber Company balance sheet, and a draft loan document which referred to the borrower as the "sucker" (Tr. 373-377; Govt. Ex. G-25).

Frick was arrested, pursuant to an arrest warrant, by FBI agent McDaniels accompanied by four other agents, while he was standing outside his automobile with the car door open. McDaniels identified himself and stated to Frick that he was under arrest (Tr. 364-368). While placing Frick under arrest, McDaniels saw the briefcase lying on the floor in the back of the vehicle immediately behind the driver's seat, and seized it (Tr.364-367).[1] Frick's motion to suppress the evidence was denied (Tr. 369; see also proceedings on Motion to Suppress Illegally Seized Evidence, February 16, 1972, Tr. 19-26).

**ARGUMENT**

Petitioner has no standing to challenge the seizure of Frick's briefcase from Frick's car at the time of Frick's arrest. In *Brown* v. *United States*, 411 U.S. 223, 229, the Court held that to establish his standing a party must show that he was on the premises at the time of the contested search and seizure; that he had a proprietary or possessory interest in the premises searched; or that he was "charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." See also *Alderman* v. *United States*, 394 U.S. 165, 173, 176-180; *Simmons* v. *United States*, 390 U.S. 377; *Jones* v. *United States*, 362 U.S. 257, 261. Petitioner clearly does not meet these criteria. Petitioner was not present at the time of the search, he has demonstrated no proprietary or possessory interest in the automobile or briefcase searched, and was not charged with an offense requiring possession.

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[1]Petitioner implies (Pet. 11) that McDaniels had examined Frick's car and observed the briefcase prior to Frick appearing on the scene. This is unsupported by the transcript either as cited by petitioner (Tr. Motion to Suppress at 19) or elsewhere.

The record, therefore, establishes that petitioner was without standing to challenge the sufficiency of the search and seizure, as the court of appeals found (Pet. App. 82-83).

Moreover, petitioner did not move to suppress the evidence seized prior to trial, or at trial; nor did he raise this issue at the court of appeals. Petitioner alleges for the first time in his petition to this Court that the briefcase seized from Frick's car actually belonged to him and that he simply had lent it to Frick to use (Pet. 6). Since the issue of petitioner's ownership of the briefcase was not raised previously, it would be inappropriate for this Court to make that factual determination in the first instance. *Lawn* v. *United States*, 355 U.S. 339, 362,n. 16; *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2.[2]

2. Petitioner contends (Pet. 22-45) that the government failed to disclose to him information which was favorable to his case.[3] The three items of information

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[2]Petitioner's co-defendant Frick moved, unsuccessfully, to suppress the evidence found in the briefcase, but petitioner did not join in that motion. Even assuming, *arguendo*, that petitioner was the lawful owner of the seized briefcase, that he has not waived his right to make that claim, and that he had standing to challenge the search, we rely on the court of appeals' finding that the search and seizure in this case were lawful (Pet. App. 83-88). See *Chimel* v. *California*, 395 U.S. 752, 763; *Chambers* v. *Maroney*, 399 U.S. 42, 52; *United States* v. *Robinson*, 414 U.S. 218; *Cardwell* v. *Lewis*, No. 72-1603, decided June 17, 1974. Moreover, even if this search were found to be unlawful, this would constitute harmless error in light of the overwhelming evidence of guilt present in this case and the cumulative nature of the evidence in the briefcase. *Chapman* v. *California*, 386 U.S. 18, 22-24; *Harrington* v. *California*, 395 U.S. 250.

[3]Contrary to petitioner's contention (Pet. 22), petitioner did not move for the production of exculpatory material. However, co-defendant Frick filed such a motion, which was granted.

which petitioner asserts should have been surrendered to him are: an F.B.I. report indicating that an Oklahoma City Postal Inspector was familiar with Tangible Risk Insurance, Co., Ltd.; correspondence from the Postal Inspector in Shreveport relating to the existence of Tangible Risk; and correspondence from Joseph P. Humphreys, who was the Executive Director of the Non-Admitted Inurers Information Office, relating to certain corporate aspects of Tangible Risk. After the court of appeals affirmed the decision of the district court in this case, petitioner and Frick moved in the district court for a new trial, alleging, among other things, that the prosecutor had failed to reveal the material at issue here. After an evidentiary hearing, the trial court in a written opinion denied the motion. That denial is now pending on appeal in the Fifth Circuit. It is thus unnecessary for this Court to consider those issues. In any event, we rely on the thorough opinion of the district court denying the motion, which shows that the evidence in question was neither material nor exculpatory.[4] As the court of appeals correctly pointed out, "*Brady* * * * does not require all evidence to be produced to the defense, just that which is material. *United States* v. *Jordan*, 399 F. 2d 610, 615 (2nd Cir., 1968)." (Pet. App. 89).

3. Petitioner contends that certain statements (see Pet. 46-47, 50-56) made by the prosecutor during his opening statement, trial, and in closing argument were improper and prejudicial thereby requiring reversal. This contention is without merit. Typical statements complained of in the opening argument are:

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[4]We are lodging with the Clerk a copy of the opinion and transcript of testimony on the motion for a new trial. See Opinion, pp. 5-9.

We feel that we will prove that the defendants did devise a scheme to defraud * * * [Tr. Opening argument, p. 5].

We intend to prove that they promoted their scheme all over the United States * * * [*ibid.*].

* * * * *

In fact, I think that the evidence will verify that Mr. Crawly considered himself threatened by the defendants not to take any action against them to get his money back [Tr. Opening argument, pp. 8-9].

* * * * *

In closing:

We feel that after looking at those exhibits, you will in fact return a verdict of guilty [Tr. Closing argument, p. 88].

* * * * *

His Honor instructed we need only prove one act. I submit to you we proved all acts [*Id.*, p. 92].

* * * * *

No objections were made to any of these statements at the time they were made. As to the opening statement, it is necessarily made before evidence is presented and the prosecutor can only say what he intends to prove. In closing argument, the prosecutor tries to assist the jury in analyzing, evaluating and applying the evidence, and he has the right to express his judgment or opinion as to the conclusions to be drawn from facts in evidence. *Tuckerman* v. *United States*, 291 Fed. 958 (C. A. 6), certiorari denied, 263 U.S. 716; *United States* v. *Holt*, 108 F. 2d 365 (C. A. 7), certiorari denied, 309 U.S. 672,

rehearing denied, 309 U.S. 698; *Henderson* v. *United States*, 218 F. 2d 14, 19 (C. A. 6).[5]

4. Petitioner also contends that the court committed numerous errors in its rulings and instructions (Pet. 62-63). These contentions were all rejected by the court of appeals (Pet. App. 88) on whose opinion we rely (Pet. App. 88-90).[6] Only one deserves fuller comment.

Petitioner contends that the district court's instruction that "it's not necessary to determine whether Mr. Petersen was a member of a conspiracy" (Tr. 446), was plain error. Petitioner takes this instruction out of context. The entire instruction clarifies the court's charge. The court stated:

> In other words, it's not necessary to prove that every one of those acts alleged in Count I was agreed on or that every one of them was done, but what the evidence must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, that one or more of the means or methods described in the indictment were agreed upon to be used in an effort to accomplish some object or purpose of the charged conspiracy and that two or more persons, including one or both of the accused, were knowingly members of the conspiracy, as charged.

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[5]Petitioner also raised improper closing argument as one of his grounds for a new trial, and this issue, like the *Brady* issue, is pending appeal in the Fifth Circuit. See Opinion on motion for new trial, pp. 9-10.

[6]Petitioner also challenges the trial judge's refusal to grant a continuance after changing his decision to sever the trials of petitioner and his co-defendant. However, he has not shown any prejudice to him caused by the denial of his motion for a continuance.

> You may consider, in determining this, the actions of the Defendants, each of them separately. In determining whether or not either Defendant was himself a member of the conspiracy, you are not to consider what the other Defendant said or did. In other words, to determine whether or not Mr. Frick was a member of the conspiracy, you may consider only what Mr. Frick said or did, and it's not necessary to determine whether Mr. Petersen was a member of a conspiracy, you must consider only what Mr. Petersen said or did.
>
> If you find it proved beyond a reasonable doubt, however, applying this test, that they were both members of the conspiracy, then you may consider what either of them did separately thereafter as evidence against the other one. [Tr. 445-447.]

This charge read as a whole was not erroneous; it emphasized the necessity of making a finding as to each conspirator. It was clear under the charge, however, that the jury could not find a conspiracy without finding that the conspirators, beyond a reasonable doubt, conspired with each other to break the law.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1974.